NO. 91-26

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

AVANTI SERVICES, INC.,
Petitioner

V.

GLENDEL DRILLING COMPANY and
PIONEER PRODUCTION CORPORATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Under general maritime law, contractual provisions which shift liability by requiring indemnity for the indemnitee's own fault are enforceable. The legislatures of various states have recognized that such liability shifting agreements remove incentives for personnel safety, and so have sought to protect the safety of their citizens who work in the maritime environment of oilfields by voiding such agreements as against public policy.

Conflicting decisions within the Fifth Circuit have resulted in criteria to determine whether a contract is maritime or non-maritime, in which latter case state law applies to void the indemnity agreement. The application of those conflicting criteria yields results which the panel herein described as "rather absurd."

The questions presented are:

1. Whether liability shifting via contractual indemnity should be disallowed in maritime law (as is liability shifting via tort indemnity) in the interest of safety?

2. Whether state anti-indemnity statutes applicable to offshore oil and gas exploration and production should be adopted as "substitute" maritime law in the interest of safety?

3. What criteria should properly be utilized in determining whether a contract is maritime or non-maritime?

LIST OF PARTIES

1. Petitioner, Avanti Services, Inc. has no parent companies or subsidiaries.

The insurer of Avanti Services, Inc. is Mutual Fire, Marine & Inland Insurance Company, in rehabilitation, Constance B. Foster, Commonwealth of Pennsylvania, Rehabilitator.

2. Respondent, Glendel Drilling Company, has no parent companies. GCH Drilling Ventures is a wholly-owned subsidiary of Glendel Drilling Company.

The subrogated insurer of Glendel Drilling Company is Highlands Insurance Company, which is a wholly-owned subsidiary of Halliburton, Inc.

3. Respondent, Pioneer Production Corporation, is now a wholly-owned subsidiary of Mesa Operating Ltd. Partners, including Mesa Limited Partnership and Pickens Operating Company, all of which are owned or controlled by T. Boone Pickens.

The subrogated insurer of Pioneer Production Corporation is Mission National Insurance Company, in receivership, James D. Odiorne, Austin, Texas, Ancillary Receiver.

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IN THE

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OCTOBER TERM, 1991

No._____

AVANTI SERVICES, INC.,
Petitioner

V.

GLENDEL DRILLING COMPANY and
PIONEER PRODUCTION CORPORATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Avanti Services, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 898 F.2d 1083, and is reprinted in the appendix to this petition at Pet. App. 1a - 11a. The denial of panel and *en banc* rehearing is reported at 931 F.2d 892, and is reprinted in the appendix to this petition at Pet. App. 12a - 13a. The opinion of the United States District Court for the Western District of Louisiana regarding the applicability of maritime law is unpublished and is reprinted in the appendix hereto at Pet.

App. 14a - 19a. The opinions of the United States District Court for the Western District of Louisiana regarding reasonableness of the settlements based on the probable liability of Avanti's indemnitees are unpublished and are reprinted in the appendix hereto at Pet. App. 20a - 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1990. A Petition for Rehearing before the panel and a Suggestion for Rehearing *en banc* were denied on April 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Louisiana Oilfield Anti-Indemnity Statute, La. Rev. Stat. Ann. § 9:2780, is set forth in the appendix to this petition at Pet. App. 26a - 30a.

Texas has adopted a similar statute. Tex. Civ. Prac. & Rem. Code Ann. § 127,001 et seq.

STATEMENT OF THE CASE

The petition in this case arises out of the granting of a motion for summary judgment in the trial court and the affirmance of that summary judgment by the appellate court. There are, then, no issues of fact to cloud the purely legal issues raised in this petition.

Petitioner, Avanti Services, Inc. ("Avanti") contracted with Pioneer Production Corporation, now Mesa Operating Ltd. Partners ("Pioneer") to drill and complete an oil/gas well on Pioneer's lease in Louisiana's inland waters. Avanti then contracted with Glendel Drilling Com-

pany ("Glendel") for Glendel to provide a drilling barge and drilling crew, and with Schlumberger Well Services ("Schlumberger") to provide wireline down-hole services consisting, *inter alia*, of taking and analyzing core samples. Schlumberger's equipment was located on a barge adjacent to Glendel's drilling barge. On the side of Glendel's barge, there was a hatch door which was bent and jammed open so as to obstruct passage along the perimeter of the barge. Glendel knew of the jammed door and knew that Schlumberger personnel were using that doorway to pass along the perimeter of Glendel's barge. A Schlumberger employee, Ernest Lewis, fell from Glendel's barge while attempting to make his way past the hazard created by the bent and jammed door. His body was found in the water in the vicinity of the door.

As is typical in the oilfield, the contracts between Avanti/Glendel and Avanti/Pioneer obligated Avanti to hold harmless and indemnify the other parties, even for those parties' own fault.

Before trial, Glendel and Pioneer settled with Ernest Lewis' widow. The trial court entered summary judgment on both the reasonableness of the settlements and Avanti's obligation to indemnify the settlors because the indemnity provisions were governed by maritime law rather than state law.

The appellate court questioned both the logic and the persuasiveness of the jurisprudence which it felt compelled to follow in finding that maritime law governed the enforceability of the indemnity provision. It recognized

> the rather absurd inconsistency that. . .exists between applying maritime law to certain mineral exploration contracts when the drilling occurs in

> state territorial waters, as here, while state law governs precisely the same contractual relationship a few miles further [sic] offshore pursuant to the OCSLA.

898 F.2d at p. 1087 (citations omitted).

In its opinion, it left the decision regarding "an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result" to the *en banc* court (898 F.2d at p. 1085).

Nevertheless, after considering the matter for over a year, the appellate court denied both panel rehearing and rehearing *en banc*.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the trial court was under general maritime law. 28 U.S.C. § 1333(1).

REASONS FOR GRANTING THE WRIT

Using the guidelines set forth in Rule 10 of the Rules of this Court, petitioner respectfully suggests that:

I. a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court;

II. a state court of last resort has decided a federal question in a way that conflicts with the decision of a United States court of appeals; and

III. a United States court of appeals has rendered a decision which acknowledges a conflict between decisions of that same court.

Petitioner will now treat each of these reasons in turn.

I.

CONTRACTUAL LIABILITY SHIFTING

As the panel decision herein noted:

> Moreover, for the purposes of interpreting the reach of federal maritime law, the relative importance that one attaches to the use of "vessel" in offshore oil exploration, the dissimilarity between such exploration and traditional maritime concerns, the impact of potential harm to maritime commerce, and the need for uniformity are matters that have not been settled by the Supreme Court or our court.

898 F.2d at 1087.

This case presents important public policy issues regarding the basic purpose of maritime law. Is that purpose to maintain the uniformity of maritime law at all cost, or is it to protect and promote safety for those individuals who make their livelihood in the maritime environment? Here, Glendel's incentive to maintain its barge so as to be safe for use by those people who work on it was reduced because Glendel would not be ultimately liable for accidents caused by its own fault. Glendel required Avanti to bear that ultimate cost, even though Avanti had no authority over Glendel's hazardous barge. As a result of that hazard, a life was lost.

It is respectfully submitted that, if the purpose of maritime law is to protect maritime workers by promoting

safety, that purpose is thwarted by the present state of maritime law, which allows enforcement of contractual indemnity to protect those (like Glendel) who engage in unsafe practices. Safety can be promoted in either of two ways:

A. By this Honorable Court holding that contractual indemnity for the indemnitee's own fault (like liability shifting via tort indemnity) no longer has a place in maritime law; or

B. By this Honorable Court holding that when a state has expressed an interest in the safety of its citizens who work in a maritime environment by legislatively enacting anti-indemnity statutes, those statutes serve as "substitute" maritime law.

A. ***No Place in Maritime Law***

In *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975), this Court abandoned the admiralty rule of divided damages in collision cases, in favor of comparative fault. In footnote 11, it noted that

> It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a comparative negligence rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others.

In *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979), the Court quoted from footnote 11 of *Reliable Transfer*, supra, and held that

> The reasoning of *Reliable Transfer* loses none of its cogency in the context of a non-collision personal injury case.

In *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 501 (5th Cir. 1982), it was recognized that the *Reliable Transfer* comparative fault principles has been extended in *Leger*, supra, to "non-collision personal injury cases as well." In following those comparative fault principles, it was also emphasized that tort indemnity based upon active/passive negligence, as a "method of liability shifting" (670 F.2d at 500) has

> no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party.

670 F.2d at 502.

Since a voiding of contractual indemnity for the indemnitee's own fault does not violate either the Contract Clause[1] or the Equal Protection Clause[2] of the United States Constitution, there is no impediment to abandoning liability shifting via contractual indemnity in maritime law in the interest of safety, just as divided damages were abandoned in *Reliable Transfer* and liability shifting via tort indemnity was abandoned in *Loose*.

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[1] *Aucoin v. Pelham Marine, Inc.*, 593 F.Supp. 770, 777 n.3 (W.D. La. 1984).

[2] *Bryant v. Platform Well Service, Inc.*, 563 F.Supp. 760, 762-64 (E.D. La. 1983).

B. *"Substitute" Maritime Law*

Louisiana's Anti-Indemnity Statute does not conflict with any purpose of maritime law, nor is it preempted by federal maritime law. *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514, 1518 (5th Cir. 1988). Indemnity clauses in maritime contracts are typically construed under maritime law (1) more or less by default because States have not had an extensive regulatory interest in contracts of indemnity and (2) because of the federal interest in maintaining a uniform body of maritime law. *Id.* In the area of oil and gas production on navigable waters, however, Louisiana has expressed on overriding interest in indemnity agreements because such agreements affect safety. Maritime law is "ill-adapted" to deal with oil and gas problems, while state law is well suited to do so. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir. 1988). In this area, the uniformity of maritime law would not be disturbed to a degree which would justify excluding the expressed interest of the state. *Sohyde v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1138 (5th Cir. 1981). Should not Louisiana's Anti-Indemnity Statute (which is self-limiting to exploration for and production of minerals) be applied as "substitute" maritime law? *Kossick v. United Fruit Co.*, 365 U.S. 731, 741, 81 S.Ct. 886, 893, 6 L.Ed. 2d 56 (1961), *reh'g denied*, 81 S.Ct. 1657.

II.

STATE COURT CONFLICT

In *Rodrigue v. Legros*, 563 So. 2d 248 (La. 1990), *reh'g denied*, 563 So. 2d 257, the Louisiana Supreme Court concluded

> that application of the Louisiana [Oilfield Anti-

> Indemnity] statute would interfere with the uniform features of the federal maritime law in violation of the federal constitution.

Id. at 250.

This decision by Louisiana's court of last resort is in direct conflict with the U.S. Fifth Circuit decisions in *Stoot v. Fluor Drilling Services, Inc.*, supra, and *Sohyde v. Coastal States Gas Producing Co.*, supra.

The Louisiana Supreme Court also noted (as did the panel herein) the lack of guidance by this Court:

> Despite this multitude of cases involving the applicability of state law in maritime situations, the [United States Supreme] Court has developed no clear test for determining when such application is appropriate and when it violates the constitution.

Rodrigue v. Legros, supra, 563 So. 2d at 253.

III.

MARITIME CONTRACT CRITERIA

This case also presents the need for this Court to resolve what the panel decision herein described as "an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result ..." 898 F.2d at 1084.

The panel also noted that

> This case radiates with the uncertainties that exist in this area of the law. Although it is technically resolved by application of settled authority, the persuasiveness of that authority is much in doubt.

Id. at 1087.

The contradictory line of cases and the uncertainties referred to by the panel decision herein relate to the determination of a contract as maritime or non-maritime. At the time of the panel decision, there was one contradictory line of cases. They involved the characterization of various aspects of offshore oil exploration as "maritime commerce." Since the panel decision, other contradictory lines of cases have arisen to perpetuate the confusion. They involve the necessity of a "vessel" to a maritime contract and resort to the plaintiff's "seaman" status to determine whether a contract is maritime.

A. *Maritime Commerce*

The "apparently contradictory line of cases" to which the panel referred culminated in two contradictory decisions.

In *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986), it was held that offshore drilling for oil and gas is "maritime commerce." *Theriot* was based on *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981), in which it was held that offshore wireline services are maritime in nature. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 105 S.Ct. 1421, 1427, 84 L.Ed. 2d 406, 414 (1985), this Court specifically criticized *Pippen's* "expansive view of maritime employment." The Fifth Circuit has recognized that, despite *Theriot*,

> The continued validity of these cases [upon which *Theriot* relied] has not been tested in light of *Herb's Welding*.[3]

Nevertheless, the panel herein felt compelled to apply

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[3] *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1043, 1049 n.10 (5th Cir. 1990).

Theriot (898 F.2d at 1068) and *en banc* rehearing to test the validity of those cases was denied.

The contradictory (and later) decision is *Thurmond v. Delta Surveyors*, 836 F.2d 952 (5th Cir. 1988), in which it was held that the providing of wireline services (which are a part of drilling) is "clearly a nonmaritime obligation." *Id.* at 955.[4] Rather than rely on the questionable validity of *Theriot* and the decisions upon which it was premised, the *Thurmond* panel applied the criteria laid down by this Court in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972).

There is no difference between the use of a vessel for drilling and the use of the same vessel for wireline services (which were being performed herein by Schlumberger). Wireline services typically are done after the well is partially drilled in order to "log" the well to see where the oil is.[5] Both drilling and wireline services use the same specialized non-maritime appurtenances which have been imported from land use and placed on vessels—the derrick and draw works. Both the initial drilling and the following wireline services are parts of the same continuous project—oil and gas exploration and production. If wireline services are not maritime commerce, neither is drilling. The issue is whether waterborne oil and gas exploration and production

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[4] The *Thurmond* panel strove mightily to distinguish *Theriot* on the ground that the drilling contract in Theriot "specifically addressed the use of a ship," whereas the wireline service contract in *Thurmond* "did not address in any way the use of a ship" (836 F.2d at 955). However, as noted in Judge Garwood's concurrence, the work order for wireline services "called for the barge to itself function as the base from which the work could be performed." *Id.* at 957 n.1.

[5] *Domingue v. ODECO*, 923 F.2d 393, 394 n.3 (5th Cir. 1991).

(not the individual parts along the continuum of that enterprise) bears such a significant relationship to "maritime commerce" to oust otherwise applicable state law? So, the imagined distinction that the contract in *Theriot* called for services *including* wireline services, while the contract in *Thurmond* called *exclusively* for wireline services[6] is not a valid distinction.

B. *"Vessel" Status*

In the line of cases culminating in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989), it was held that, when a structure is used primarily as a work platform, even though it once was used as a vessel, and any transportation function it serves is merely incidental to its use as a work platform, it is not a "vessel" under general maritime law. But *Theriot* ignored the fact that, in contracting for a barge to be used for either drilling or wireline services, or both, what was being contracted for is a work platform, not a "vessel." The *Theriot* court simply assumed that the barge was a "vessel" and so required the application of maritime law. The *Thurmond* court on the other hand, found that:

> The wireline services contract between P & S and Gulf Oil did not address in any way the use of a ship. The Barge KATHY's use for the transportation of wireline equipment and workers was incidental to the contract's principal obligation.

Thurmond v. Delta Surveyors, supra, 836 F.2d at 955.

The panel herein, following *Theriot*, did not address the "vessel" status issue.

It should be noted that, under *North Pacific S.S. Co.*

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[6] *Domingue*, supra note 5, 925 F.2d at 398.

v. Hall Bros. Maritime Ry. & S. Co., 249 U.S. 119, 39 S.Ct. 221, 63 L.Ed 510 (1919), whether the contract is to be performed on a vessel, or even on navigable waters, is not decisive. The fundamental question is the nature of the contract, which must have relevance to maritime commerce.

Nevertheless, *Thurmond* sought to distinguish *Theriot* on the ground that the contract in *Theriot* called for the use of a vessel. But the *Theriot* panel did not address the issue of the purpose the barge was intended to serve. It was satisfied with the mere fact that the contract called for a barge, no matter what its purpose.

So, the imagined distinction that the contract in *Theriot* called for the contractor to provide a barge as well as services, while the contract in *Thurmond* called for only services[7] is not only factually incorrect but it is also legally invalid. The inquiry should not be whether a barge is to be provided. It should be what purpose the barge is intended to serve.

C. ***Five Additional Factors***

In *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 315 (5th Cir. 1990), still another panel of the Fifth Circuit attempted to resolve the "confusion" which has resulted from the decisions in *Theriot*, *Thurmond*, and herein. In attempting to articulate "a fairly consistent underlying approach," the *Davis* panel utilized five factors to be considered in characterizing the contract, in addition to what the contract itself provides. In so doing, the *Davis* panel considered the Jones Act seaman status of the plaintiff's decedent (*id.* at 317). However, in two prior decisions,

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[7] *Domingue*, supra note 5, 923 F.2d at 397 ("In contrast [to *Theriot*], the contracts in *Thurmond* and in this case did not require that the contractor provide a vessel.").

it had been held that the plaintiff's seaman status is not determinative of the nature of his employer's contracts with others.[8]

In attempting to consider the five additional factors articulated in *Davis,* the *Domingue* panel went right back to attempting to distinguish *Theriot* and *Thurmond. Domingue,* supra note 5, 923 F.2d at 397.

So, not only does confusion still reign even after *Davis*, but it also seems appropriate to question whether any of *Davis'* additional five factors should properly be considered. Should not the nature of a contract be determined by the type of service(s) to be provided and the purpose of the vessel as contemplated in the contract?

CONCLUSION

I.

It is respectfully submitted that the writ should be granted so that maritime law can be made uniform as to liability shifting. A tort feasor cannot now shift away his liability (and his incentive to promote safety) via tort indemnity, but he can do so by the simple expedient of requiring a contractor to assume his liability in a contract.

If this Court does not agree that contractual liability shifting should be outlawed at the federal level, then the writ should be granted in order to give effect to the expressed interest of the various states in promoting the safety of their citizens by outlawing contractual indemnity shifting.

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[8] *Lefler v. Atlantic Richfield Co., Inc.*, 785 F.2d 1341, 1343 (5th Cir. 1986); *Jones v. Berwick Bay Oil Co., Inc.*, 697 F.Supp. 260, 267 (E.D. La. 1988).

If this Court will outlaw contractual liability shifting at either level, then the confusion which presently reigns in the Fifth Circuit and the Louisiana Supreme Court will be cured by mootness.

II.

If this Court does not agree that contractual liability shifting should be outlawed, then the writ should be granted so that this Court can cure the confusion in the Fifth Circuit, which was offered the opportunity to cure the confusion itself *en banc*, but declined to do so, and in the Louisiana Supreme Court.

Respectfully submitted:

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APPENDIX A

LEWIS v. GLENDEL DRILLING CO.

Beverly Locks LEWIS, Individually and as the Tutrix of Her Minor Children, Nona Aisha Lewis, Erisa Kironda Lewis, Jamal William Lewis, Benita Leshawn Lewis and Jeriel Nicole Lewis, Plaintiff,

v.

GLENDEL DRILLING COMPANY and Pioneer Production Corporation,
Defendants.

AVANTI SERVICES, INC., Defendant,
Third Party Defendant,
Cross-Defendant, Appellant,

v.

GLENDEL DRILLING COMPANY and
Highlands Insurance Company, Defendants,
Cross-Plaintiffs, Appellees,

Mesa (as Successors to Pioneer Production),
Third Pary Plaintiff,
Cross-Defendant, Appellee.

No. 88-4934.

United States Court of Appeals,
Fifth Circuit.

April 26, 1990.

Appeal from the United States District Court for the Western District of Louisiana.

Before GEE and JONES, Circuit Judges, and HUNTER [1], District Judge.

EDITH H. JONES, Circuit Judge:

This case confronts us again with the vexing question whether liabilities arising from offshore mineral exploration are to be determined under federal admiralty or state law. The result here is foreordained by precedent, but because of an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result, the appellant would justly ask "why?". Perhaps this court should seek to answer Avanti's question *en banc*.

I.

FACTS

Avanti Services, Inc., appellant, signed a turnkey contract with Pioneer Production Corporation (now Mesa Operating Ltd. Partners) to drill a well in Vermillion Block 55 in the territorial waters of Louisiana. Avanti hired Glendel Drilling to furnish a barge rig. The two contracts contain indemnity clauses designed to protect, respectively, Pioneer and Glendel from liability arising out of injuries to employees or invitees of Avanti on the drilling site.[2] Except for references to the furnishing of tugs or

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[1] Senior District Judge of the Western District of Louisiana sitting by designation.

[2] Pioneer-Avanti contract:

> 11.3 Contractor [Avanti] agrees to protect, defend, indemnify, and save Operator [Pioneer], its joint owners' and their respective officers, directors, and employees harmless from and against all claims, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Contractor's employees or

crewboats in a checklist of equipment needed for the drilling, neither contract mentions a vessel or any maritime condition as bearing upon the work to be performed. Given the location of drilling, however, the use of an offshore drilling rig was obviously necessary. The contracts are in large part form documents used in onshore and offshore mineral exploration.

During the drilling, Avanti hired Schlumberger Well Services to log the well's progress. On April 16, 1985, Schlumberger's crew was on the rig either engaged in or just having completed this task when it was discovered that Ernest Lewis, an employee of Schlumberger, had drowned. He had apparently been trying to transfer to the pipe barge, and thence to Schlumberger's equipment barge, which were moored next to Glendel Rig 18.

Lewis's widow filed suit alleging general maritime claims against Pioneer, Glendel, and Avanti and a Jones Act claim against Schlumberger. The liability actions eventually settled, leaving for resolution the cross-claims for contractual indemnity filed by Pioneer and Glendel against Avanti.[3] The Court initially granted Pioneer's and

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Footnote 2 continued.

Contractor's sub-contractors or their employees, on account of bodily injury, death, or damage to property.

Avanti-Glendel contract:

14.9 Operator's indemnification of Contractor. Operator [Avanti] agrees to protect, defend, indemnify, and save Contractor [Glendel], its officers, directors, employees and joint owners harmless from and against all claims, demands, and causes of action of every kind and character, without limit and without regard to the causes or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees, or Operator's invitees, other than those parties identified in paragraph 14.8 on account of bodily injury, death or damage to property. . . ."

[3] Avanti's contracts with Schlumberger and Glendel did not permit

Glendel's motions for summary judgment granting indemnity under maritime law, but upon Avanti's request, it decided to hold a hearing and reconsider.

Avanti alleged that a fact issue existed concerning whether Schlumberger was its invitee at the time of the accident. Avanti had stitched together a circumstantial case suggesting that after Schumberger finished its work for Avanti on April 16, it commenced an entirely different logging operation that must have been ordered by the lease operator Pioneer. If the accident occurred during the later, hypothetical engagement, Avanti contended, Schlumberger and Lewis its employee, had become Pioneer's invitees and the indemnity tables were turned, because Avanti was owed indemnity by Pioneer for injury to Pioneer's invitees. The court, after a hearing and receiving further evidence and briefs, rejected Avanti's argument and entered judgment calling for Avanti to indemnify Pioneer and Glendel according to their settlements with Plaintiffs.[4]

On appeal, Avanti continues to urge that summary judgment was erroneously ordered on the invitee issue. More important, however, Avanti questions the applicability of maritime law to its contractual indemnity obligations. We shall discuss these issues in inverse order.

Footnote 3 continued.

indemnity of Avanti for loss attributable to Avanti's payments of contractual indemnity. *See Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir.1981).

[4] No other issues relating to the indemnity obligations are before us.

II.

CONTRACTS FOR OFFSHORE OIL DRILLING AS MARITIME CONTRACTS

Avanti contends that its contracts with Pioneer to drill the wildcat well in Louisiana territorial waters and with Glendel to furnish its barge rig for that purpose are not maritime contracts.[5] The essence of a maritime contract, Avanti urges, is a connection with a vessel, but the instant contracts do not refer to a vessel. In a broader sense, Avanti urges that there is nothing inherently maritime in the business of offshore mineral exploration and that state law is better suited to resolve the problems it poses. Finally, because the contract which led to the death of Ernest Lewis was for the performance of wireline services by Schlumberger, Avanti contends that we are bound by our past recognition that wireline services performed offshore do not constitute maritime activity. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988).

[1,2] The relevant law of our circuit does not support Avanti's argument. Since at least as early as 1970, our authorities have identified contracts for offshore drilling and mineral operations involving the use of a "vessel" as maritime in nature. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir.1986) (contract for use of "the drilling barge Rome"); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir.1981) (contract for casing services to be performed on an inland drilling barge); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge "Mr. Charlie"*, 424 F2d

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[5] If Louisiana law governs Avanti's contracts with Pioneer and Glendel, Avanti would not be liable for contractual indemnity by operation of Louisiana's Oil Field Anti-Indemnity Act, La. Rev.Stat.Ann. § 9:2780 (West.Supp.1989).

684, 691 (5th Cir.1970) (as to contract for offshore drilling and reworking operations, the court said "of course, the construction of a maritime contract is governed by federal, not state, law." [citations omitted]). Likewise, each of these cases interpreted an indemnity clause in the particular drilling or offshore servicing contract. As Avanti concedes, a contract need not specifically reference a vessel if it is actually "maritime". The drilling contract in *Theriot, supra,* provided that the drilling company "would furnish the equipment, materials, supplies, and services necessary to the drilling and completion of the well." 783 F.2d at 538. These terms are substantially similar to the terms of the contract between Avanti and Pioneer. The court's conclusion in *Theriot* that the contract "focused upon the use of a vessel", *i.e.* the drilling barge identified in an exhibit to the contract, inescapably leads to the same conclusion in this case.

A recent decision of this court questions whether *Theriot's* broad characterization of maritime contracts comports with the Supreme Court's decision in *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). *See Union Texas Petroleum Corp. v. PLT Engineering, Inc.* 895 F.2d 1043 (5th Cir.1990). Judge Brown's opinion in *Union Texas* goes on to

> construe *Theriot* narrowly and constrain it to its facts. Since no drilling on navigable waters from a vessel is involved here, *Theriot* is not controlling.

Union Texas, at 1049. "Constrained to its facts," however, *Theriot* still controls the result in this case. Avanti's reliance on *Union Texas* must be limited to a plea for en banc review of the *Theriot* line of cases.

Only one case arguably runs counter to this authori-

ty. Avanti relies heavily on *Thurmond* for the proposition that a contract to furnish wireline services is "clearly a non-maritime obligation". . . "performed on land-based wells and offshore wells, and wireline services present hazards and problems peculiar to the oil and gas industry. 836 F.2d at 955. *Thurmond* applied state law to the construction of an indemnity clause in a wireline service contract, although the contract was performed and the employee injured while working on a wireline barge in Louisiana territorial waters. *Thurmond* is, however, distinguishable precisely because the contract there interpreted called solely for the performance of wireline services by a contractor. Because our other cases hold that contracts to drill a well offshore or to provide general services in connection therewith are, when performed from a movable drilling platform, maritime obligations, we must be bound by those authorities rather than by the special-purpose contract in *Thurmond*.

More difficult to dispose of is Avanti's reliance on the choice-of-law analysis applied by *Thurmond* and *Union Texas*. For although we are bound by cases construing contracts essentially analogous to those in issue here, we recognize the logical conflict between holding that such cases are inherently maritime while a contract for wireline services, not specifically referencing the offshore nature of the work, but actually performed from a barge, is not. Judge Garwood noted the apparent inconsistencies among some of our cases in this area, as well as their failure to cross-cite each other, in his concurrence to *Thurmond*, 836 F.2d at 957-58.

From these inconsistent lines of authority springs the potential for significant uncertainty in the law applicable to offshore mineral exploration. The application of maritime or state law to a particular contract may turn, as

in *Thurmond*, on the degree of specificity with which it identifies operations offshore or on navigable waters. It may turn on whether the particular contractor furnished a "vessel" in connection with his work. It may depend on whether the work is performed from a fixed platform or one of the several types of movable rigs that we have held to be "vessels." By act of Congress, whether the contract covered activity in state territorial waters or on the Outer Continental Shelf will also have an impact on the choice of law. *See* Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a); *Laredo Offshore Constructors Inc. v. Hunt Oil Company*, 754 F.2d 1223 (5th Cir.1985).

How to resolve these inconsistencies is perplexing. What appears to us as a serious legal conundrum may have had little effect in the real world. That is to say, oil companies, drilling contractors and oil field service companies, together with their insurers, may already have adjusted to the overlapping applications of maritime and state law by choice of law clauses[6] or adjustments in the rates of coverage. We should not lightly "straighten out" the formal logic of the law where to do so would upset stable commercial expectations. Moreover, for purposes of interpreting the reach of federal maritime law, the relative importance that one attaches to the use of "vessels" in offshore oil exploration, the dissimilarity between such exploration and traditional maritime concerns, the impact of potential harm to maritime commerce, and the need for uniformity are matters that have not been settled by the Supreme Court or our court.

This case radiates with the uncertainties that exist in

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[6] *See, e.g., Angelina Casualty Co. v. Exxon Corp.*, 876 F.2d 40, 42 (5th Cir.1989); *but compare Union Texas, supra*, at 1050 (parties may not contract away choice of law mandated by Congress through OCSLA).

this area of the law. Although it is technically resolved by application of settled authority, the persuasiveness of that authority is much in doubt.

There are at least three ways to resolve the inconsistency among our precedents. First, we could hold that no movable offshore oil and gas rig, when moored and engaged in exploration or production, is a vessel. This would apply the realistic view of *Thurmond* and *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981) that (a) federal maritime law was not intended to cover liabilities arising from mineral exploration and (b) the adjective use of vessels to assist in such operations is not sufficient to invoke the law of admiralty. This result would also eliminate the rather absurd inconsistency that otherwise exists between applying maritime law to certain mineral exploration contracts when the drilling occurs in state territorial waters, as here, while state law governs precisely the same contractual relationship a few miles further offshore pursuant to the OCSLA. *See Laredo Offshore Constructors, Inc. v. Hunt Oil Company, supra.* As Judge Garwood put it,

> Given the OCSLA directed applicability of state law to such activities when conducted on the outer continental shelf, *see Laredo,* there is plainly much to be said, as Judge Wisdom points out, for also applying state law when the same activities are conducted in the state's territorial waters.

Thurmond v. Delta Well Surveyors, supra at 957-58 (Garwood, J., concurring). Despite our reflexive invocation of admiralty jurisdiction to cover contracts involving movable offshore rigs, we have in the OCSLA context recognized that admiralty law is unsuited to dealing with

extraction of minerals from the sea bottom. *Laredo,* 754 F.2d 1228 (citing legislative history of OCSLA and *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969)). *See also Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 1428, 84 L.Ed.2d 406 (1985) ("[t]here is nothing inherently maritime about" building and maintaining pipes and platforms on the outer continental shelf).

Second, we could retain our decades-old holding that movable offshore rigs are non-traditional "vessels" in admiralty, even when moored in place, while attempting to articulate consistent standards for maritime contracts and liabilities. A variation on the second alternative would be to overrule *Thurmond* and *Union Texas* and apply maritime law to all offshore mineral exploration contracts, save those governed by the OCSLA. Whether one of these results, or others we have not yet conceived, should prevail, we leave to the decision of the court *en banc.*

III.

SCHLUMBERGER'S INVITEE STATUS

[3] Avanti contended that at the time Ernest Lewis drowned, Schlumberger may have been an invitee of Pioneer rather than itself on Glendel Rig 18, inasmuch as Schlumberger may have been performing services at Pioneer's request. Although Avanti's theory is intriguing, it was not supported by sufficient evidence to raise an issue for summary judgment purposes. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Avanti purported to substantiate its claim with affidavits from two of its employees. One of them stated that the daily drilling log for the well and Schlumberger's invoice for its logging activities both covered a type of log-

ging activity that Avanti had not specifically requested Schlumberger to perform, and it noted that Avanti was not charged for this service. The second Avanti employee stated that he "had no interest" in certain activity that continued on the platform after Schlumberger removed particular equipment from the hole that was needed for Avanti's contract requirements. Neither employee attested that Schlumberger actually performed any additional logging that evening.

In response to this evidence, Glendel submitted affidavits from Mesa (formerly Pioneer) and Schlumberger attesting that Pioneer did not request Schlumberger to perform any logging services of the type contended by Avanti and that Schlumberger did not do any work on the well other than as requested by Avanti. Avanti's evidence does not squarely contradict these affidavits, hence, no genuine issue of material fact appeared over whether Schlumberger was the invitee of Pioneer at the time of the accident.

For the foregoing reasons, the judgment of the trial court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4934

Beverly Locks LEWIS, Individually and as the Tutrix of Her Minor Children, Nona Aisha Lewis, Erisa Kironda Lewis, Jamal William Lewis, Benita Leshawn Lewis and Jeriel Nicole Lewis, Plaintiff,

v.

GLENDEL DRILLING COMPANY and Pioneer Corporation, Defendants.

AVANTI SERVICES, INC., Defendant, Third Party Defendant, Cross-Defendant, Appellant,

v.

GLENDEL DRILLING COMPANY and Highlands Insurance Company, Defendants, Cross-Plaintiffs, Appellees,

Mesa (as Successors to Pioneer Production), Third Party Plaintiff, Cross-Defendant, Appellee.

FILED
APR 16 1991

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Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 26, 1990, 5 Cir., 198__, ____F.2d____)

(APRIL 16, 1991)

Before GEE and JONES, Circuit Judges, and HUNTER*.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the requests of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones

United States Circuit Judge

*Senior Judge of the Western District of Louisiana, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 16 1988

BEVERLY LOCKS LEWIS, ET AL

VS. CIVIL ACTION NUMBER 85-1973

GLENDEL DRILLING CO.,
ET AL SECTION O - JUDGE SHAW

RULING

Now before this court is the motion of Avanti Services, Inc. for reconsideration of this court's ruling of August 3, 1988 which denied Avanti any relief from this court's prior granting of a summary judgment against Avanti.

This court has ruled on this issue twice previously; therefore only a brief summary of the facts will be given. Plaintiff, Beverly Locks Lewis, brought a wrongful death claim against the defendants as a result of her husband Ernest Lewis' drowning. Ernest Lewis was an employee of Schlumberger when he drowned while working on a well location. The well was owned by Pioneer, operated by Avanti and being worked by Glendel. Avanti called Schlumberger to the well site in the inland waters of Terrebonne Parish, in order to perform logging work on the date in question. All of plaintiff's claims against all of the

defendants have been compromised through payments made by all defendants with the exception of Avanti. The only remaining issue is the effect which various indemnity provisions may have on Avanti's liability.

Avanti claims that summary judgment against Avanti should not have been granted for either of two reasons. First, Avanti claims that an issue of material fact still exists as to whether Schlumberger, the employer of plaintiff's decedent, was working for Avanti or for Pioneer at the time of this accident. This remaining issue would preclude the granting of a summary judgment against Avanti. Secondly, Avanti argues that the contract between Avanti and Glendel is governed by Louisiana law and the Louisiana Anti-Indemnity Act as opposed to maritime law. For the sake of clarity, this court will now rule on both of these issues again and state reasons.

In its September 1, 1987 ruling, which granted Glendel's motion for summary judgment, this court stated:

> Schlumberger was called out to the location by Avanti and paid by Avanti. The facts clearly show that Schlumberger was Avanti's subcontractor. We find no merit in the claim that the time of Mr. Lewis' death has an effect on Schlumberger's status as subcontractor of Avanti.

Subsequently, Avanti filed a motion for a new trial which was denied by this court on December 11, 1987. Another motion by Avanti for relief from the September 1, 1988 order or for new trial was denied by this court on August 3, 1988.

For a third time, Avanti has asked this court, in one form or another, to decide this issue that was ruled upon on

September 1, 1987. This court finds that no genuine issue of material fact exists and upholds its previous rulings granting summary judgment against Avanti for the following reasons.

Avanti essentially argues that as soon as the logging gun was out of the hole, Avanti's "turnkey" contract became inapplicable and Schlumberger became a direct "day note" contractor of Pioneer. Based on this, Avanti argues that an issue of material fact exists as to the time that decedent died. If the death was after the logging gun was out of the hole, then Avanti argues that Schlumberger was not its subcontractor; therefore, Avanti owes no indemnity. However, the court finds that this is irrelevant because the Glendel-Avanti contract provides in paragraph 14.9 that Avanti is to indemnify Glendel not only for injuries to Avanti's subcontractor employees, but also for injuries to "operator's invitees." There is no issue of material fact concerning the fact that Schlumberger was Avanti's invitee. Avanti was clearly the party that called Schlumberger out to the rig. In *Blanks v. Murco Drilling Corp.* 766 F.2d 891 (5th Cir. 1985), the court defined an "invitee" under Louisiana law as a person who goes onto a premises with the expressed or implied invitation of the occupant, on business of the occupant or for their mutual advantage. Invitee status is determined by who invites the injured party onto the premises. In this case, it is clear that Schlumberger was invited to the site by Avanti. Schlumberger's invitee status did not end when the logging gun was taken out of the hole.

Since it has been determined that Avanti owes indemnity to Glendel under paragraph 14.9 of the contract, this court must now address Avanti's second contention. Aventi contends that the indemnity provision in the contract is unenforceable because this is a non-maritime con-

tract governed by Louisiana law not maritime law. If Louisiana law applies, then the indemnity provision is invalid based on the Louisiana Anti-Indemnity Act. If maritime law, the indemnity provision is valid.

Glendel and Pioneer moved for summary judgment against Avanti claiming that they both had maritime contracts with Avanti which provided for Avanti to indemnify Glendel and Pioneer. Avanti's latest argument is that "new law" exists, specifically *Thurmond v. Delta Well Service Surveyors,* 836 F.2d 952 (5th Cir. 1988), which mandates a finding that the indemnity provisions in question are governed by Louisiana law, not maritime law. However, it is this court's opinion that *Thurmond, supra,* is distinguishable from the present case; therefore, it is not controlling. Further, this court finds that *Theriot v. Bay Drilling Corp.,* 783 F.2d 527 (5th Cir. 1986) is still controlling.

In *Thurmond, supra,* the contract called for the performance of wireline services for a well in navigable waters. The court concluded that this was a non-maritime obligation as it did not concern the operation of the vessel. The use of the vessel for the transportation of wireline equipment and workers in *Thurmond, supra,* was incidental to the contract's principal obligation; i.e. to perform wireline services. This is distinguishable from *Theriot, supra,* where the contract did not only incidentally touch on a vessel, but directly addressed the use and operation of a vessel. It is this court's opinion that *Theriot* is still the controlling law in cases such as this where the contract was to obtain services of a drilling barge to perform drilling exploration services. As stated in this court's September 1, 1987 ruling, it was noted that the contracts of both Pioneer and Glendel with Avanti provided for services to be rendered which were directly related to Glendel Rig No. 18 - a semi-submersible vessel in maritime commerce.

Even if it is found that the contracts in question are not maritime contracts, they are at the very least "mixed" contracts, governed by maritime law. This court expressed that opinion in its August 3, 1988 ruling to which it attached the case of *Barnes v. Kerr-McGee, et al*, No. 84-3026 consolidated with 84-4754 and 85-132 (E.D. La. 1985).

Some Fifth Circuit decisions on this question appear to be in conflict in their analysis of this problem area but not necessarily in their final results which are not inconsistent with *Hale v. Co-Mar Offshore Corp., et al*, 588 F. Supp. 1212 (W.D. La. 1984) and *Home Insurance Company v. Garber*, 588 F. Supp 1218 (W.D. La. 1984). Further, this court is not aware of any appellate decisions where maritime law has not been applied to *indemnity* agreements where the injured party was either engaged in the performance of a maritime obligation arising out of a maritime contract or a mixed contract where the maritime subject matter could be separated from the non-maritime elements.

In this case the accident occurred while the decedent was engaged in the performance of a maritime obligation. If the contract is not maritime, it certainly is mixed and the indemnity agreement will be governed by maritime law. It should be noted that the *Hale-Garber* rationale has worked well in this area since the passage of the Louisiana Anti-Indemnity Act and its intrusion into offshore cases. We continue to apply *Hale* and *Garber, supra*, pending further guidance from a higher court.

For the foregoing reasons, the motion for reconsideration filed by Avanti is hereby DENIED. This court still holds to its previous rulings which granted the motions for summary judgment filed by Glendel and Pioneer.

Opelousas, Louisiana, November 16, 1988.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment Entered - 11-17-88
By - Trelirs Moore
Copy To - Joy; Kops; Matuschka;
Redurne/Resor; Robinson/Gray/ McNamara
Truxillo; Gooch/Bourgeois; Hughes;
Simmons/Toher; Hayes;

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 16 1988

BEVERLY LOCKS LEWIS, ET AL

VS. CIVIL ACTION NUMBER 85-1973

GLENDEL DRILLING CO.,
ET AL SECTION O - JUDGE SHAW

R U L I N G

Now before this court is the motion of Glendel Drilling Company and Highlands Insurance Company for judgment on reasonableness of settlement ordering Avanti to pay to Glendel and Highlands all funds expended in defense and settlement of primary demand.

Avanti has no opposition to the court ruling on this issue but claims that a final judgment should not yet be rendered due to two unresolved issues. First, Avanti points to the motion to reconsider pending before this court concerning whether maritime or Louisiana law applies. Secondly, Avanti points to the issue of whether Schlumberger was working for Avanti or Pioneer at the time of decedent's death. Both of these issues have been decided by this court in another ruling issued by this court on this same day.

Since no unresolved issues remain in this case, this court will now rule on the reasonableness of settlement and issue a final judgment. The settling defendant need only show potential liability (rather than actual liability) to recover settlement payments where either (1) defendants tender the defense of the action to the indemnitor; (2) the claim for indemnity is founded upon a judgment; or (3) the defendant's claim is based upon a written contract of insurance or indemnity. *Wisconsin Barge Line, Inc. v. Barge Kim 300,* 546 F.2d 1125 (5th Cir. 1977); *Terra Resources v. Lake Charles Dredging and Towing,* 695 F.2d 828 (5th Cir. 1983).

In the present case, Glendel has shown that they had potential liability to the decedent's family, either as a seaman or as a 905(b) longshoreman. The record shows that plaintiff's body was found in the vicinity of an open door on the side of the rig adjacent to barges on which his equipment was located. It further shows that Glendel knew the location of the barges and the fact that the opened door was being used by Schlumberger employees despite the fact that there was no barge in front of it. Captain Chauvin's deposition states that he found no signs of foul play but the watertight door on the rig was jammed so as to obstruct the pathway along the rig. Captain Chauvin opined that decedent fell as he tried to proceed around the hatch door that was bent at the bottom and jammed open. The report of the plaintiff's expert concluded that Glendel had failed to provide the workers with a safe passageway and had created a hazard with the bent door. Further, plaintiff's rig expert was of the opinion that the accident occurred as a result of a poorly maintained door in an improper arrangement.

Glendel has clearly demonstrated "potential liability" to the court. Avanti claims that under the test stated

in *American Export Isbrandtsen Lines, Inc. v. U.S.*, 390 F. Supp. 63 (S.D.N.Y. 1975), it owes no indemnity to Glendel. Under *American Export*, Avanti argues that the indemnitee (Glendel) has a duty to take reasonable measures in the course of litigation to protect the interests of indemnitor (Avanti). It is this court's opinion that Glendel acted reasonably in settling. A *motion in limine* to exclude Captain Chauvin's testimony, which is what was suggested by Avanti, is not enough to defeat Glendel's showing of potential liability. Furthermore, Avanti could have brought the *motion in limine* itself.

Accordingly, Glendel's motion for judgment on the reasonableness of settlement is GRANTED.

Opelousas, Louisiana, November 16, 1988.

/s/ John M Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment Entered - 11-17-88
By - Trelirs Moore
Copy To - Joy; Kops, Matuschka; Reddurne/Resor; Robinson/Gray/McNamara; Trusills; Gooch/Bourgeous; Hughes; Simmons/Toher; Hayes

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 16 1988

BEVERLY LOCKS LEWIS, ET AL

VS. CIVIL ACTION NUMBER 85-1973

GLENDEL DRILLING CO.,
ET AL SECTION O - JUDGE SHAW

R U L I N G

Now before this court is the motion of Mesa Operating Limited Partners, successor in interest to Pioneer Production Corporation ("Pioneer") for judgment on reasonableness of settlement ordering Avanti to pay to it all funds expended in defense and settlement of primary demand.

Avanti has no opposition to the court ruling on this issue but claims that a final judgment should not yet be rendered due to two unresolved issues. First, Avanti points to the motion to reconsider pending before this court concerning whether maritime or Louisiana law applies. Secondly, Avanti points to the issue of whether Schlumberger was working for Avanti or Pioneer at the time of decedent's death. Both of these issues have been decided by this court in another ruling issued by this court on this same date.

Since no unresolved issues remain in this case, this court will now rule on the reasonableness of settlement and issue a final judgment. The settling defendant need only show potential liability (rather than actual liability) to recover settlement payments where either (1) defendants tender the defense of the action to the indemnitor; (2) the claim for indemnity is founded upon a judgment; or (3) the defendant's claim is based upon a written contract of insurance or indemnity. *Wisconsin Barge Line, Inc. v. Barge Kim 300,* 546 F.2d 1125 (5th Cir. 1977); *Terra Resources v. Lake Charles Dredging and Towing,* 695 F.2d 828 (5th Cir. 1983).

In the present case, Glendel has shown that they had potential liability to the decedent's family, either as a seaman or as a 905(b) longshoreman. The record shows that plaintiff's body was found in the vicinity of an open door on the side of the rig adjacent to barges on which his equipment was located. It further shows that Glendel knew the location of the barges and the fact that the opened door was being used by Schlumberger employees despite the fact that there was no barge in front of it. Captain Chauvin's deposition states that he found no signs of foul play but the watertight door on the rig was jammed so as to obstruct the pathway along the rig. Captain Chauvin opined that decedent fell as he tried to proceed around the hatch door that was bent at the bottom and jammed open. The report of the plaintiff's expert concluded that Glendel had failed to provide the workers with a safe passageway and had created a hazard with the bent door. Further, plaintiff's rig expert was of the opinion that the accident occurred as a result of a poorly maintained door in an improper arrangement.

Pioneer has clearly demonstrated "potential liability" to the court. Avanti claims that under the test stated

in *American Export Isbrandtsen Lines, Inc. v. U.S.*, 390 F. Supp. 63 (S.D.N.Y. 1975), it owes no indemnity to Pioneer. Under *American Export*, Avanti argues that the indemnitee (Pioneer) has a duty to take reasonable measures in the course of litigation to protect the interests of indemnitor (Avanti). It is this court's opinion that Pioneer acted reasonably in settling. A *motion in limine* to exclude Captain Chauvin's testimony, which is what was suggested by Avanti, is not enough to defeat Pioneer's showing of potential liability. Furthermore, Avanti could have brought the *motion in limine* itself.

Accordingly, Pioneer's motion for judgment on the reasonableness of settlement is GRANTED.

Opelousas, Louisiana, November 16, 1988.

/s/ John M Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment Entered - 11-17-88
By - Trelirs Moore
Copy To - Joy; Kops, Matuschka; Reddurne/Resor; Robinson/ Gray/McNamara; Trusills; Gooch/ Bourgeous; Hughes; Simmons/ Toher; Hayes

APPENDIX F

LSA-R.S.9: 2780. Certain indemnification agreements invalid

A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or

oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

D. (1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement

shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the: "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or companies who drill with the Frasch Process, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those services or activities include drilling through the Frasch process.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(1) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

H. The provisions of this Act do not deprive a person who has transferred land, with a reservation of mineral rights, of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals in connection with the reserved mineral rights; provided such person does not retain a working interest or an overriding royalty interest convertible to a working interest in any production obtained through activities described in Subsection C of this Section.

I. This Act shall apply to certain provisions contained in, collateral to or affecting agreements in connection with the activities listed in Subsection C which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly

referred to in the oil industry as master or general service agreements or blanket contracts in whatever form and by whatever name. The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.